

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT

01/17/2013

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
C. McCain
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

TRIAL MINUTE ENTRY
DAY 16

Courtroom SCT5C

State's Attorney:	Juan Martinez
Defendant's Attorney:	Kirk Nurmi and Jennifer Willmott
Defendant:	Present

Court Reporter, Mike Babicky, is present.

A record of the proceeding is also made by audio and/or videotape.

Prior to the start of trial Defendant's Exhibit # 388 is marked for identification.

10:49 a.m. Trial to Jury continues from 01/16/2013.

The jury is present.

Detective Esteban Flores having been previously sworn testifies further.

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State's Exhibit # 389 is marked for identification.

State's Exhibit # 389 is received in evidence.

The witness testifies further.

The witness steps down.

Jeff Strohm is sworn and testifies.

Exhibit # 366 is received in evidence.

The witness testifies further.

The witness steps down.

Leslie Udy is sworn and testifies.

LET THE RECORD REFLECT the witness makes an in court identification of the Defendant.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of hearing of the jury on the record.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of hearing of the jury on the record.

The witness testifies further.

LET THE RECORD REFLECT Counsel approach the bench and discussion is held out of hearing of the jury on the record.

The witness testifies further.

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LET THE RECORD REFLECT Juror Questions have been received by the Court; same are discussed with Counsel out of hearing of the jury, and the Court addresses the witness regarding the issues.

FILED: Juror Questions

State rests.

11:32 a.m. The Jury is reminded of the admonition and stands in recess until 01/29/2013 at 10:30 a.m. Court remains in session.

Counsel for the Defendant moves for a Rule 20 Order.

Counsel present argument to the Court.

IT IS ORDERED taking the matter under advisement.

11:51 a.m. Court stands in recess until 01/28/2013 at 10:30 a.m.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

LATER:

UNDER ADVISEMENT RULING

The court has considered the defendant's oral motion for mistrial made on January 15, 2013 and argued on January 16, 2013. Defendant's position is that a mistrial is required because Detective Melendez testified at trial that text messages on the victim's cell phone could have been copied or photographed by police in June 2008. Defendant argues this testimony is inconsistent with information previously provided to defense counsel by the State. Defendant also argues the prosecutor elicited false information at trial regarding the availability of these text messages in June 2008.

In 2010, Defendant filed a Motion to Dismiss Charges or in the Alternative, Motion to Dismiss Death Due to Brady Violation. Testimony during an evidentiary hearing established new software had been created that would permit police to retrieve the text messages from a cell phone's memory card. On July 1, 2010, the State provided Defendant with all text messages from the victim's cell phone. See Notice Regarding Text Messages Stored in Victim Travis

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Alexander's Cellular Telephone filed July 1, 2010. On July 2, 2010 the court denied the Defendant's Motion to Dismiss Charges or in the Alternative, Motion to Dismiss Death Due to Brady Violation.

Mistrial "is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570 ¶ 43, 74 P.3d 231, 244 (2003) and *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial....'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). "To prove prosecutorial misconduct, the appellant must show: (1) the state's actions were improper; and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Montano*, 204 Ariz. 413, ¶ 70, 65 P.3d 61, 75 (2003), *quoting State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992).

Trial in this case began in December 2012. Defendant received the text messages from the victim's cell phone in July 2010. The State asserts no false information was provided to the defendant regarding the availability of these text messages. Text messages from the victim's cell phone were not available in 2008 because of the Verizon retention policy in effect at that time. The fact the text messages could have been photographed by police who viewed the messages in 2008 was known to the defendant in 2010 and was considered by the court in making its ruling in July 2010. Defendant failed to establish any prejudice to her case related to these issues. The court finds no basis to support the request for mistrial on the assertion that there was prosecutorial misconduct related to these text messages.

IT IS ORDERED denying the defendant's second motion for mistrial.

The court has also considered the defendant's oral motion for Judgment of Acquittal under Rule 20, *Arizona Rules of Criminal Procedure*. Defendant requests the court grant a judgment of acquittal on the felony murder theory of First Degree Murder. Specifically, Defendant argues there is no evidence to support the State's theory that the defendant remained unlawfully after committing a felony, aggravated assault, in the victim's home. Defendant claims the defendant was an invited guest in the victim's home and that there is no evidence to support the State's position that she entered the victim's home to facilitate the commission of any felony. The State argues the defendant's status as an invited guest changed when the defendant stabbed the victim, thus committing an aggravated assault. According to the State's theory, the defendant was no longer an invited guest for purposes of all wounds inflicted after the first wound. At that point, Defendant remained unlawfully in a residential structure for purposes

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of committing a felony. In addition, the State argues the evidence establishes the defendant entered the victim's home with a gun and knife for the purpose of committing the assault. See A.R.S. § 13-1504 and §13-1508.

In March 2010, the State provided notice that **the underlying felonies supporting the predicate felony of burglary in the second degree of the felony murder charge are** first degree murder (or any lesser included offense of first degree murder) and/or aggravated assault. See Notice of Underlying Felony, filed March 31, 2010. Defendant subsequently moved to dismiss the felony murder charge, arguing that the charge was insufficient as a matter of law. That motion was denied by the court following oral argument on June 18, 2010. In its ruling on that issue, the court cited to *State v. Moore*, 222 Ariz. 1, 14, ¶ 61, 213 P.3d 150, 163 (2009). In that opinion, the Arizona Supreme Court specifically rejected the argument that felony murder cannot be predicated on a burglary based on the defendant's intent to murder. It did so, in part, based on *State v. Miniefield*, 110 Ariz. 599, 601, 522 P.2d 25, 27 (1974), in which the Court noted that the felony murder statute "does not draw a distinction between one who intends to kill another by fire and one who only intends to burn down a dwelling house and accidentally kills one of the occupants." *Id.* See also *State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192, 198, ¶ 23, n.4 (2010) (**noting that it rejected the defendant's argument in *Moore* that "one cannot commit felony murder when one committed burglary in order to commit murder"**). Burglary may occur when a person remains unlawfully with the intent to commit a felony, as the State alleges here. See A.R.S. § 13-1507(A).

"Substantial evidence is proof that reasonable persons could accept as adequate to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Bearup*, 221 Ariz. 163, 167 ¶ 16, 211 P.3d 684, 688 (2009). The court finds substantial evidence to support a conviction on a felony murder theory based upon the evidence presented at trial. The court also finds there is substantial evidence to warrant a conviction on both of the charged theories of First Degree Murder based upon the evidence presented at trial.

IT IS ORDERED denying the defendant's oral motion for Judgment of Acquittal under Rule 20, *Arizona Rules of Criminal Procedure*.